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No. 07-1597

IN THE
SUPREME COURT OF THE UNITED STATES

BHUPENDRA K SHAH- PETITIONER

vs.

HELEN HAYES HOSPITAL, AND NYS DEPARTMENT OF HEALTH - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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Date: August 12, 2008

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REASON FOR THE SUPPLEMENTAL BRIEF

The Supreme Court of the United States decided Engquist v. Oregon Dept. of Agriculture and Boumediene et al v. Bush et al respectively **on June 9, 2008 and une 12, 2008.** The petitioner could not provide any analysis of these cases in his petition because he read these two cases after he gave his petition for printing at 9.30 A.M. on June 13, 2008. Note that the petition was mailed to the Court on June 18, 2008 by UPS. In addition, it took time for the *pro se* petitioner to comprehend the impact of these cases on his pending petition. In addition, the *pro se* petitioner was able to discover the meaning and application of "equal protection component of the due process clause of the Fifth Amendment to the Constitution.

I. CONSTITUTIONAL PRIVILEGES AND EQUAL PROTECTION COMPONENT OF DUE PROCESS CLAUSE OF THE 5TH AMENDMENT.

(I.1) Even though the petitioners are aliens detained at Gauntanamo after being captured in Afghanistan or elsewhere abroad, the Supreme Court held that the

petitioners have constitutional privilege of a habeas corpus and that they are not barred from seeking the writ or invoking the Suspension Clause's protection. (See Boumediene et al v. Bush et al, which was decided on June 12, 2008).

Here, in sharp contrast, even though the petitioner is an American citizen scientist, the Court of Appeals for the Second Circuit denied him the benefit of constitutional privileges. Instead of giving strict scrutiny to constitutional claims, it applied baseless facts - such as the petitioner was using his or her opposition to a dispositive motion as a means to amend his complaint - to evaluate the merit of petitioners' constitutional claims.

(I.2) A cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment to Constitution in favor of those who seek to enforce their constitutional rights. The plaintiffs in Bolling v. Sharpe, 347 U.S. 497 (1954), for example, claimed that they had been

refused into certain public schools in the District of Columbia solely under the 5th Amendment and on the general federal- question jurisdiction of the district courts, 28 U.S.C. § 1331 (See also Davis v. Passman 442 U.S. 228 (1979)).

Here, in his complaint, the petitioner has alleged violation of his constitutional rights under 1st, 5th and 14th amendment to the Constitution of United States. The following paragraphs support that the clerk of the Court of Appeals denied the petitioner the benefit of equal protection component of the Due Process Clause of the 5th Amendment to U..S. Constitution:

(a) The Court of Appeals for the 2nd Circuit issued a scheduling order requiring respondents to file their brief by March 12, 2007. On March 2, 2007, respondent filed a motion to enlarge the time to file their brief by April 11, 2007. Section 7 of the Civil Appeal Management Plan ("CAMP") states:

> Motions to leave to file oversized briefs, to postpone the date on which briefs are required to be filed, or to alter the date on which argument to be heard, shall be accompanied by an affidavit or other statement and shall be made not later than two weeks before the brief is due or the argument is scheduled unless exceptional circumstances exist. Motions not conforming this requirement will be denied.

Therefore, their motion dated March 2, 2007 was late by three days and was in fact time barred. Instead of denying their motion, Ms. Lynette Rodriguez granted it. In addition, even though, on October 22, 2007, the petitioner had orally argued that respondents' March 2nd, 2007 motion was time barred pursuant to Civil Appeal Management Plan ("CAMP"), the panel took no corective action.

(b) In addition, in her letter dated December 23, 2007 to the petitioner, Ms. Catherine Wolfe, who is the clerk, stated that "The Civil Appeal Management Plan("CAMP") does not apply to pro se appeals." Your honor, the following two reasons support that

Ms. Wolfe made a misstatement in her letter: (i) The CAMP rule does not explicitly state that these rules do not apply to pro se appeals. (ii) However, even assuming that it is true, but the petitioner learned that Ms. Lynette Rodriguez, who granted respondents' March 2nd, 2007 motion, was subsequently transferred to another position of initial case management clerk after December 23, 2007. Your honor, if CAMP rules do not apply to pro se appeals as claimed by Ms. Wolfe, then why would any reasonable person transfer a clerk to another unit without a reason? This does not make sense. It supports that Ms. Wolfe's claim that CAMP does not apply to pro se appeals has no merit. As a result, the clerk of the court denied the petitioner the benefit of equal protection (i.e., between a unrepresented party and a party represented by an attorney) component of the Due Process Clause of the Fifth Amendment to the constitution of the United States.

II. PANEL'S FAILURE TO APPLY WELL-SETTLED ISSUES ON EQUAL PROTECTION CLAUSE.

Because the first question rests upon conflict of principles of stare decisis to deny the petitioner's constitutional rights, it is necessary to provide the pertinent background including citations:

In his complaint, the petitioner has alleged that he had been discriminated, retaliate d and harassed against his race and national origin in violation of his Title VII and Constitutional rights under the First, Fifth and Fourteenth Amendments (see the Magistrate judge's R & R at page 12a). It is clear that the petitioner did assert differential treatment (in promotion, transfer, training etc.) based on his race and national origin. Therefore, the petitioner did state a claim under the traditional Equal Protection Clause of the 14th Amendment. As a result, the "class of one" theory (See Village of Willowbrook v. Olech, 528 U.S. 562 (2000)) does not apply, and it does not apply even

though the petitioner was a public employee during his tenure. Engquist v. Oregon Dept. of Agriculture, et al. 128 S. Ct. 2146; 176 L.Ed.2 d 975 (June 9, 2008).

The Supreme Court has explained long ago that the Fourteenth Amendment "requires that all persons subjeted to . . . legislation shall be treated alike, under the like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Hayes v. Missouri, 120 U.S. 68, 71-72, 7 S. Ct. 350, 30 L.Ed. 578 (1887).

It is well settled that the Equal Protection Clause "protect[s] persons, not groups," Adarand Constructors v. Pena, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995) and that the Clause's protection applies to administrative as well as legislative acts. Raymond v. Chicago Union Traction Co., 207 U. S. 30, 35-36 (1907). It is equally well settled that States do not escape the strictures of the Equal Protection Clause in their role as employers. See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Harrah

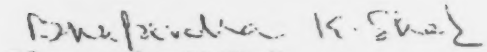
Independent School Dist. v. Martin, 440 U.S. 194 (1979) (per curiam); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam).

Here, the petitioner was treated differently on account of his race and national origin (i) when the respondent asked the petitioner to submit an application on CC-2E form for a promotion, and the employer promoted white employees without having them to submit such an application to the Department of Civil Service; (ii) when he was not allowed to work in his specialty of "Research Scientist (Biostatistics)," while others in a similar situation were freely allowed to work in any field they like it; (iii) when the employer converted a hallway without a door as an office space whereas foreign scientists (including the wife of one foreign scientist) were given 14' x 14' office space with a lock, wall to wall carpet etc.; (iv) White employees, contractors and a temporary employee were provided Medi Tech training and no such training was provided to the petitioner and so on (Please refer to pages 5 -8 (A.2 through A.6) of the petitioner's brief).

As supervisors of a district judge and Article III judges, it permits the panel to review whether the district judge has fulfill his duties in reviewing the magistrate's R & R, as an Article III judge. Flournoy Jr. v. Marshall et al, 842 F. 2d 875 (6th Cir. 1988). Here, the district judge made misstatements (i) that the Title VII claims are both time barred and failure to exhaust and (ii) that there is no infirmity in Magistrate's R & R. The Court record supports that the petitioner had presented evidences of constitutional claims at each step of the adjudicatory process (including the complaint). The 9th Circuit stated "We also review constitutional claims de novo." Masnauska v. Gonzales 432 F.3d 1067 (9th Cir. 2005). Here, instead of finding constitutional violations under the "clearly erroneous" standard, the panel of judges applied applied its own idea - such as the petitioner was using his or her opposition to a dispositive motion as a means to amend the complaint- to deny the petitioner's constitutional rights. Please note that their idea had no basis in facts.

III. Conclusion: The petitioner humbly and respectfully prays this Court to grant the writ of certiorari.

Respectfully Submitted



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